

REMARKS

Claims 1-17 are in the application. No Claim stands allowed.

Claim 7 is objected to for lack of antecedent basis for the term “flap”.

Claim 7 has been cancelled by the present response.

Withdrawal of the objection to Claim 7 is respectfully requested.

Claims 1-5 and 8-14 stand rejected under 15 USC 102(b) as being anticipated by U.S. patent No. 5,499,836 to Kohl (“Kohl patent” or “Kohl”).

“When the defense of lack of novelty is based on a printed publication that is asserted to describe the same invention, a finding of anticipation requires that the publication describe all of the elements of the claims, arranged as in the patented device”

C.R. Bard Inc. v M3 Systems, Inc. 48 USPQ2d 1225,1230

Citing: *Shearing v. Iolab Corp.* 24 USPQ2d 1133 (Fed. Cir. 1992);
Richardson v. Suzuki Motor Co. 9 USPQ2d 1913 (Fed Cir. 1989); *Perkin-Elmer Corp. v. Computervision Corp.* 2211 USPQ 673 (Fed. Cir. 1984).

Claim 1, as amended, reads as follows:

Claim 1. (currently amended) A fitment for a container
having a top end and a first wall associated with the top end, comprising
means defining an opening through the first wall associated
with the top end of the container,
a circumferential flange member,
a second wall circumscribing said opening through the first
wall associated with the top end of the container,
said second wall upstanding from said flange member,

said second wall defining a conduit having entrance and exit ends through which contents of the container may be discharged,

at least said exit end of said conduit having a substantially ellipsoidal planar cross-sectional geometry having at least one major portion and at least one minor portion,

said minor portion being disposed vertically above said major portion when said fitment is affixed to the first wall of the container and the container is oriented in a direction for discharge of the contents of the container through said opening and substantially simultaneous ingress of ambient air into the container through said minor portion of said fitment, a tear away membrane disposed across and closing said conduit and including pull ring means affixed to said tear away membrane at a location within said minor portion of said cross-sectional geometry of said conduit thereby providing for localization of an initial tear away force applied through said pull ring.

The Examiner contends that Claim 1, as originally submitted, shows:

a fitment for a container

having a wall 24 associated with the top end 14 of a container as seen in Figs. 1, 4 and 5,

means 38 defining an ellipsoidal cross-sectional opening through the wall 24 for exiting product,

a circumferential flange 30, a wall 52 circumscribing the opening 38,

a cap member 22 integrally formed in a hinged relationship with the top wall,

the cap includes a first and second annular projections 72 and 74 respectively extending from the cap surface 70 and defining a space 76, see column 5, lines 55-57.

At the outset, it is noted that Claim 1, as amended, includes a tear-away membrane and a pull ring employable to tear away the membrane.

Moreover, amended Claim 1 recites that:

“when said fitment is affixed to the first wall of the container and the container is oriented in a direction for discharge of the contents of the container through said opening and substantially simultaneous ingress of ambient air into the container through said minor portion of said fitment”.

Kohl does not disclose a tear-away membrane.

Kohl does not disclose a pull ring associated with the tear-away membrane.

Kohl does not disclose that the pull ring is operatively connected to the tear-away membrane “at a location within said minor portion of said cross-sectional geometry of said conduit thereby providing for localization of an initial tear away force applied through said pull ring”.

In view of the absence in Kohl for the foregoing elements of the invention as defined in amended Claim 1, among other reasons, it is respectfully submitted that Claim 1 is not anticipated by Kohl.

Claims 2-5 are dependent from amended Claim 1, either directly or indirectly, and therefore inherit each and every one of the elements of their base Claims and any intervening Claims. For the reasons set forth hereinabove in discussing the allowability of Claim 1, among others, it is respectfully submitted that Claims 2-5 are not anticipated by Kohl.

Claim 8 is an independent Claim and has been currently amended to read as follows:

“Claim 8. (currently amended). In a fitment for attachment to a wall portion of the top end of a container having pourable contents and adapted to circumscribe an opening through the thickness of the wall portion of the top end of the container and including means for attachment of the fitment to the container, and a wall defining a conduit having an inboard open and an outboard open end having an outboard rim, for the discharge of the contents of the container therethrough, the improvement comprising

a planar cross sectional geometry for said outboard open end of said conduit which includes at least one major portion of a first size and at least one minor portion of a second and smaller size, said at least one minor portion of said geometry being disposed most topwise of the top end of the container when the fitment is attached to the container and the container is tilted in a direction suitable for the discharge of the contents of the container through said at least one major portion, whereby ambient air enters the container through said at least one minor portion of said geometry substantially simultaneously with the discharge of the contents from the container through said at least one major portion of said geometry.”

Kohl does not disclose that element of amended Claim 8 which provides that

“said at least one minor portion of said geometry being disposed most topwise of the top end of the container when the fitment is attached to the container and the container is tilted in a direction suitable

for the discharge of the contents of the container through said at least one major portion, whereby ambient air enters the container through said at least one minor portion of said geometry substantially simultaneously with the discharge of the contents from the container through said at least one major portion of said geometry”.

Rather, to the contrary, Kohl discloses at col. 3, lines 35 et seq.:

“In accordance with another aspect of the invention, it has been determined that a universal controlled pouring configuration for the pouring orifice is provided by an inverted teardrop shaped orifice. The inverted teardrop pouring orifice includes a converging portion with angled side surfaces approaching one another at a first end disposed adjacent a peripheral edge of the top wall of the cap member. The inverted teardrop orifice also includes a rounded, curved or semi-circular portion opposite the converging portion. The inverted tear drop shaped pouring orifice is a universal pouring orifice because it permits and promotes smooth controlled flow of both thinner and thicker recipe fluids and even thicker fluids containing large particles, such as cheese dressings.”

This same disclosure is found in Kohl beginning at col. 6, line 66 and continuing through col. 7, line 15.

It is thus respectfully submitted the Kohl can not properly be deemed to anticipate Applicant’s invention as defined in amended Claim 8.

Claims 9-11 are dependent from Claim 8, as amended, and as such they inherit each and every one of the elements of their base Claim and any intervening Claims. Accordingly, for the reasons set forth hereinabove in discussing the allowability of Claim 8, among others, it is respectfully submitted that Claims 9-11 are

not anticipated by Kohl.

Claim 12, as amended, calls for a fitment improved by:

“a conduit defined by said fitment for the discharge of contents from the container, said conduit having an exit opening of a cross-sectional geometry which includes at least one major portion of a first size and at least one minor portion of a second and smaller size, said minor portion of said geometry being disposed most topwise of the container when the fitment is attached to the top end of the container whereby said contents are preferentially discharged from the container through said at least one major portion and ambient air substantially simultaneously enters the container through said at least one minor portion of the geometry, wherein said planar cross-sectional geometry of the opening comprises first and second apices, a centerline extending through said first and second apices, and first and second opposite non-circular and non-linear sides extending between said first and second apices, said first and second opposite sides being mirror images of one another.”

As noted in discussing the allowability of amended Claim 8, Kohl does not disclose that aspect of Claim 12 wherein the orientation of the opening of the fitment provides for discharge of the contents of the container through the major portion of the opening as opposed to through the minor portion of the opening. (See col. 3, lines 35 et seq. and col. 6, line 66 and continuing through col. 7, line 15 of Kohl. Accordingly, it is respectfully submitted that Kohl does not anticipate Claim 12 of the present application.

Claims 13 and 14 are dependent from Claim 12 and therefore inherit each and every element of Claim 12. Allowance of Claims 13 and 14 is urged for the same reasons, among others, as set forth hereinabove in discussing Claims 8 and 12.

In view of the above, withdrawal of the rejection of Claims 1-5 and 8-14 under 15 USC 102 as being anticipated by Kohl is respectfully requested.

Claims 6 and 7 have been cancelled.

Claims 15-17 have been cancelled.

New Claim 18 is dependent from amended Claim 1 and inherits each and every element of Claim. Accordingly, it is urged that new Claim 18 is allowable for the same reasons, among others, as set forth hereinabove in discussing amended Claim 1.

Reconsideration of the application and allowance of Claims 1-5, 8-14, as amended, and new 18 are respectfully requested.

Respectfully submitted,

PITTS & BRITTIAN, P.C.

/Morgan L. Fitch, IV/

by: Morgan L. Fitch, IV
Registration Number 28,413

PITTS & BRITTIAN, P.C.
P.O. Box 51295
Knoxville, Tennessee 37950-1295
(865) 584-0105 Voice
(865) 584-0104 Fax